INTERIOR BOARD OF INDIAN APPEALS

United Indians of All Tribes Foundation v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

11 IBIA 276 (08/15/1983)

Also published at 90 Interior Decisions 376

Reversing:
11 IBIA 226

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UNITED INDIANS OF ALL TRIBES FOUNDATION

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-32-A (Reconsideration) Decided August 15, 1983

Reconsideration of 11 IBIA 226 (1983), dealing with denial of grant funding under the Indian Child Welfare Act, sought by Bureau of Indian Affairs.

11 IBIA 226 vacated in part; BIA decision reversed and remanded.

1. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

   Geographic location alone does not determine whether a program seeking funding under the Indian Child Welfare Act is to be characterized as "off" or "near" reservation; rather the client population served by the program is the determinative factor.

2. Regulations: Interpretation

   The Bureau of Indian Affairs will be presumed to have knowledge of decisions of the Board of Indian Appeals interpreting its regulations, and when regulations are revised without specific change in response to such a Board decision, the Bureau of Indian Affairs will further be presumed to have accepted that interpretation.

3. Indian Child Welfare Act of 1978: Financial Grant Applications: Funding

The definition of "Indian" in 25 CFR 23.2(d)(2) specifies the type of proof of Indian ancestry necessary to qualify for receipt of services funded under the Indian Child Welfare Act. It does not purport to define the client population of "near reservation" programs.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On July 29, 1983, the Bureau of Indian Affairs (BIA) sought reconsideration of the July 5, 1983, decision in this case, 11 IBIA 226 (1983), on the grounds that the regulation cited as a basis for remand in that decision, 25 CFR 23.29(b)(4), had been deleted through notice published in the Federal Register. See 47 FR 39978 (Sept. 10, 1982). The Board of Indian Appeals (Board) acknowledged that it overlooked this rule change and granted reconsideration limited to that part of the decision which remanded the case to BIA for implementation of that regulation. Order Granting and Expediting Reconsideration, August 1, 1983. The Board now vacates that part of its original decision interpreting 25 CFR 23.29(b)(4) (1982).

The background of this case was fully set forth in 11 IBIA at 228-30. That discussion is here incorporated by reference.

Appellant United Indians of All Tribes Foundation is located in Seattle, Washington, and provides social services to Indians in the Seattle/King County area. It has previously received funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (Supp. II 1978). Appellant's application for

fiscal year 1983 ICWA funds was denied by BIA on the grounds that the Seattle/King County area had been designated "near reservation" by the Puyallup Tribe and appellant did not seek funding through the governing body of that tribe as required by 25 CFR 23.25(c), .26(a), and .28(a).

"Near reservation" designations were developed in response to the Supreme Court's decision in Morton v. Ruiz, 415 U.S. 199 (1974). The designations are intended to ensure that Indians living off, but in close proximity to, their reservations receive services provided by Congress. The use of those designations under ICWA is further intended to conserve limited appropriations by preventing duplication of funding to tribal organizations serving their members living off the reservation and to independent Indian organizations, located in areas near reservations, that serve essentially the same people as the tribal organizations. Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (1983); Navajo Tribe v. Commissioner of Indian Affairs, 10 IBIA 78, 89 I.D. 424 (1982).

The essential question before the Board is whether BIA may use "near reservation" designations to deny funding to Indian organizations located in areas so designated, but serving Indians not members of the tribes making the designation. This problem arises especially in those urban areas which have large Indian populations, including large percentages of Indians from tribes not in the immediate vicinity.

Appellant in this case is such an organization. There is no dispute that appellant is located in an area that has been designated "near

reservation" by the Puyallup Tribe. 1/ The record shows, however, that of the 12,437 Indians residing in the Seattle/King County area, only about 1,300 are members of the Puyallup Tribe. 2/ Thus, approximately 11,000 Indians within appellant's service area are not members of the tribe designating the area as "near reservation."

Appellee's position is that the regulations establish that a program providing ICWA services and located in an area designated "near reservation" must seek funding through the governing body of the tribe making the designation. This argument is apparently based on the phrase "'on or near' reservation program" used throughout 25 CFR Part 23 and on 25 CFR 23.2(d)(2), which defines "Indian" for the purpose of receiving ICWA benefits under a "near reservation" program.

[1] The assertion that mere location is the ultimate determinative factor in distinguishing between a "near reservation" and an off-reservation program is inconsistent with the Board's decision in Navajo Tribe, supra. Navajo Tribe involved the question of whether the Navajo Tribe and an Indian organization located in an area designated "near reservation" by that tribe were independently eligible applicants for grants under ICWA. In finding that they were not because the Indian organization was located in an area

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1/ Appellant's contention that the designation of the Seattle/King County area as "near reservation" violated regulatory criteria set forth in 25 CFR 20.1(r) was disposed of in 11 IBIA at 233.

2/ An additional 610 Indians are members of the Muckleshoot Tribe and 570 are members of the Suquamish Tribe. Each of these tribes has proposed the Seattle/King County area as "near reservation," but final approval of the designations has not been published in the Federal Register.

designated “near reservation” by the tribe and served essentially the same client population as the tribe, the Board held that “[i]t is the character of the client population to be served, rather than the composition of the servicing organization, that is crucial to a determination under the Act [ICWA] regarding funding of Indian social services.” 10 IBIA at 86, 89 I.D. at 428.

Therefore, a finding that an Indian organization providing ICWA services is located in an area designated "near reservation" may suggest the organization provides services that duplicate services furnished by a tribe. However, the law does not provide that location alone determines whether a program is properly characterized as "off" or "near" reservation. The BIA must instead ascertain whether the client population of the program, in fact, duplicates the population for which the tribe would ordinarily be expected to provide services.

[2] The decision in Navajo Tribe, issued on August 30, 1982, was rendered before BIA's revision of its ICWA regulations, which were published in the Federal Register on September 10, 1982. The Board presumes that BIA was aware of this decision when it was preparing its regulatory revision. 3/ The BIA made no attempt to alter the Board's holding that client population is the determinative factor, or to add a new definition of “‘on or near’ reservation program.”

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3/ A similar presumption exists that the legislature is aware of prior and contemporaneous administrative interpretations of statutes, so that when a statute is reenacted without change, it will be presumed that the legislature intended to adopt the administrative interpretation. See Walker v. United States, 83 F.2d 103 (8th Cir. 1936), and cases cited therein; Conn v. United States, 68 F. Supp. 966 (Ct. Cl. 1946).

[3] Furthermore, the Board again rejects BIA's argument that 25 CFR 23.2(d)(2) defines client population for purposes of "near reservation" programs. As was discussed in footnote 2 of the Board's original decision in this case, 11 IBIA at 231, this definition, which must be read in context with section 23.2(d)(3), regarding off-reservation programs, merely specifies the type of proof of Indian ancestry necessary to qualify for receipt of services funded under ICWA. A person meeting those definitions may seek assistance through the appropriate program or programs. The regulation does not purport to define the client population of "near" or off-reservation programs.

The record in the present case indicates that appellant's client population duplicates only in very small part the individuals for whom the Puyallup Tribe has responsibility. As the Board noted at 11 IBIA at 231 n.2, there are several possible ways to address the problem presented in this case. The BIA may choose to count nonmember Indians in calculating a tribe's service population for purposes of determining maximum ICWA funding levels, thus making the tribe administratively responsible for providing services to non-tribal members living in areas designated "near reservation." Alternatively, BIA might decide to fund programs, such as appellant's, separately under the off-reservation provisions of section 202 of ICWA, 25 U.S.C. § 1932 (Supp. II 1978). This procedure might result in partial independent funding of such organizations for services to nonmember Indians and partial funding through a tribal governing body for services to off-reservation tribal members. The BIA may be able to develop other methods for ensuring that eligible individuals receive the benefits which Congress has provided for them.

In any case, the determination of how to address this issue should be made by BIA rather than by this Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 16, 1983, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is reversed and the case is remanded to the Bureau of Indian Affairs for reconsideration of appellant's application in accordance with this decision.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

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Franklin D. Arness
Administrative Judge